92-1270

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

CLIFFORD L. ZARSKY,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

Petition For A Writ of Certiorari To The Court Of Appeals For The Thirteenth Supreme Judicial District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is presence only on private business property open to the public protected from criminal trespass by the First and Fourteenth Amendments?

2. Does criminal trespass for all speech on private business property open to the public violate the First and Fourteenth Amendment protection for speech?

3. Was petitioner denied Fourteenth Amendment equal protection for greater speech rights of the Texas Constitution by the Appellate Courts' misconstruction of the facts?

4. Is criminal trespass prohibited by the First and Fourteenth Amendments on privately owned business property where there are no adequate alternative means of communication with business patrons?

5. Did the abortion clinic private business property become a limited public forum for abortion speech when permitted for use of pro-abortion public demonstrations?

6. Is the Texas trespass statute unconstitutionally overbroad as applied to access and speech on privately owned business property open to the public?

7. Is the Texas trespass statute unconstitutionally vague as applied to access and speech on privately owned business property open to the public?

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OPINION AND PROCEEDINGS BELOW

The opinion of the Texas Court of Appeals for the Thirteenth Supreme Judicial District is published at 827 S.W.2d 408 (App. Ct. – Corpus Christi 1992), and is reprinted in the appendix hereto, p.1, infra.

Petitioner was convicted by a jury of criminal trespass, Texas Penal Code No. 30.05, and was sentenced by the court to 30 days in jail and court costs. Petitioner's motion to the trial court for arrest of judgment, motion for acquittal, and motion for new trial were denied. Petitioner's appeal to the 13th Court of Appeals, and motions therein for rehearing and reconsideration en banc were denied, but motion to recall mandate was granted. Petition for Discretionary Review to the Texas Court of Criminal Appeals was refused November 4, 1992. Judge Campbell would grant. Motion to the 13th Court of Appeals to stay issuance of mandate after denial of Petition for Discretionary Review was granted.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION:

> First Amendment: "Congress shall make no law- . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
>
> Fourteenth Amendment: " . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

TEXAS CONSTITUTION:

Article I, Section 8: "Every person shall be at liberty to speak, write or publish opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press . . . "

Article I, Section 27: "The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and to apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance."

TEXAS STATUTORY LAW:

Texas Penal Code, Sec. 1.07 Definitions (a)(29) " 'Public place' means any place to which the public or a substantial group of the public has access and includes, but is not limited to streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops."

Texas Penal Code, Sec. 30.05 Criminal Trespass.

(a) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he:

(1) had notice that the entry was forbidden; or

(2) received notice to depart but failed to do so

(b) For purposes of this section:

(1) "Entry" means the intrusion of the entire body.

(2) "Notice" means:

(A) oral or written communication by the owner or someone with apparent authority to act for the owner;

(B) fencing or other enclosure obviously designed to exclude intruders or to contain livestock; or

(C) a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

(3) "Shelter center: has the meaning assigned by Section 51.002(1), Human Resources Code.

(c) An offense under this section is a Class B misdemeanor unless it is committed in a habitation or a shelter center or unless the actor carries a deadly weapon on or about his person during the commission of the offense, in which even it is a Class A misdemeanor.

STATEMENT OF THE CASE

By Information filed in County Criminal Court at Law No. 3 of Nueces County, Texas (Trial Court), Petitioner was charged with and convicted of criminal trespass by unlawfully and knowingly remaining on property without the effective consent of William S. Hopkins, the owner, said property located at 5315 Everhart Road, Corpus Christi, Texas, after notice to depart from the property by the owner, William S. Hopkins. The pertinent facts are these:

FACTS OF THE CASE

Among the many types of businesses conducted at a shopping center located at the intersection of Everhart Street and Corona Drive, Corpus Christi, Texas, in a section called Stonegate Professional Offices at 5315 Everhart, is Reproductive Services, in Suite 24, building "C" on lot 4, which provides services of abortion. The shopping center is similar to other shopping centers for goods and services comprising an area of 13.70 acres. (*Statement of Facts Vol. II-151, 200-202; Def. Exhibit-23 [Plat]; Def. Exhibit 1-18 [shopping center pictures]*)

Though there are legal boundaries of individual real estate ownership comprising the shopping center, there are no physical identifiable boundaries prohibiting access

throughout the entire shopping center. The shopping center is composed of retail stores, business offices, eating place and service businesses all open to the general public. (*Statement of Facts Vol. II, 149*) Reproductive Services is located approximately 400-500 feet distant from the public streets of Everhart and Corona, and is about in the center of the shopping center. (*Statement of Facts Vol. II, 150, 201; Def. Exhibit-23*) The entrance to the abortion clinic and the adjacent parking facilities cannot be seen from the public streets and sidewalks because of buildings between, prohibiting all communications with clients of Reproductive Services from the closest public streets and sidewalks. (*Statement of Facts Vol. II, 230; Def. Exhibit 19*) Any attempt to communicate with customers coming to the shopping center while the customer is driving onto the property would be a traffic hazard, by backing up traffic on heavily traveled Everhart street. (*Statement of Facts Vol. II, 210*)

The arresting officer, Lt. Michael McKinney, ordered officer Michael C. Ross to video tape petitioner while he was on the subject property, and the video tape was admitted as state's evidence. (State's Exhibit 2). No request was made by the owner that petitioner be arrested, though the arresting officer, Lt. McKinney, testified he arrested petitioner about fifteen minutes after Mr. Hopkins, the owner, had requested petitioner to leave because petitioner did not leave. Petitioner was arrested on a common area parking lot between office buildings adjacent to a covered walkway while standing between two police officers, about ten to twenty feet away from the rear door of the abortion clinic, which the state admitted is a publicly used passageway (*Statement of Facts Vol. V, 66, 73*). Lt. McKinney arrested petitioner only for his presence on the property, and not for any expressive speech activity or illegal conduct (*Statement of Facts Vol. II, 152*). Even though Lt. McKinney assumed the owner's tenants had authority to permit whoever they wanted on

the property, Lt. McKinney did not ask and did not know if the petitioner had permission from any tenant to be on the property (*Statement of Facts Vol. II, 154*), nor did he give the petitioner any warning that he must leave the property or be arrested (*Statement of Facts Vol. II, 144*).

The petitioner testified that he was at the location for real estate business with Brian Moore, who was also located at 5315 Everhart, and that since Brian Moore was not yet at his office, he went to the rear of the property where there was an abortion clinic " . . . to see what was going on and also to do what I could in the way of speech to prevent abortions . . . I decided not to do anything that was going to be contrary to the law . . . " (*Statement of Facts Vol. V, 92*) Petitioner testified that he believed he was not trespassing when Mr. Hopkins asked him to leave because Mr. Hopkins did not tell him he would be arrested if he did not leave (*Statement of Facts Vol. V, 44*); because he had obtained the permission of a business owner to be on the property (*Statement of Facts Vol. III, 4*); because he believed the location was a place for protected speech based on *United States Supreme Court cases* (*Statement of Facts Vol. V, 15-33*); because Police Chief Garrett had stated publicly that arrests would only be made at the abortion clinic for police assault or intrusion into the abortion clinic (*Statement of Facts Vol. V, 47-48*); because he understood the location was a "public place" by Texas statute which allowed public access (*Statement of Facts Vol. V, 50-52*); because the same location was used one week before with the owner agent's permission for a pro-abortion demonstration (*Statement of Facts Vol. V, 36-38*); and because a state prosecutor had previously defined the location of petitioner's arrest as a public passageway (*Statement of Facts Vol. V, 66, 73*).

REASONS FOR GRANTING THE WRIT

I. Amendments 1 and 14 of the United States Constitution which protect the freedoms of expression, petition, and assembly, guarantee petitioner the right of access to peaceably be on the private owned common business parking lot areas of office buildings in a shopping center, available and open to the general public and thus protect him from arrest and prosecution.

The evidence is uncontroverted that the location of petitioner's arrest was on the common area of a parking lot and common walkway between office buildings, (Opinion p.13) in the center of a shopping center four to five hundred feet from the nearest public street and sidewalk. The first question is whether there is a right to be on common areas between office buildings of private business property in a shopping center open to the public when there is no unlawful conduct or expressive speech.

A. Petitioner was not involved in any unlawful conduct either alone, as a leader or a participant, nor was he charged as a party in any unlawful conduct but trespass.

The Appellate Court found that " . . . when viewed in context, petitioner was a leader of the group which came onto Stonegate to interfere with a tenant's normal business operations. These intruders were not merely picketing, handbilling, or engaging in peaceful speech. They were sitting on the ground blocking entry to the building that housed the clinic." (Opinion p.10). The Appellate Court includes petitioner as a leader and a member of "these intruders" engaging in unlawful activities. The Appellate Court imputes criminal conduct to the petitioner that was not brought by complaint or information and is not to be found in the record, and more positively not in the prosecution video and audio which show and tell petitioner's activities and speech. The record is

devoid of any evidence that petitioner was a leader or a participant with others by his conduct or speech in any way at any time on the day of the arrest. Petitioner remained standing between two police officers a distance away from the people who were sitting down on the walkway. Lt. McKinney, the arresting officer, admitted petitioner was doing nothing unlawful, and that petitioner's presence alone was protest. (*Statement of Facts Vol. II, 152*):

> Zarsky: Was I doing any activities that you would have arrested me for if I were on a public street?
>
> McKinney: No, sir.
>
> Zarsky: Or did you see me carrying on any protest of any kind, other than my presence?
>
> McKinney: Again, yes, sir. Your presence is what I'm considering as being your protest at that particular time.

The Appellate Court further found the evidence sufficient to sustain the conviction: "As appellant . . . admitted that he was at the clinic to see what he could to prevent abortions . . . " (Opinion p.14). But the court didn't cite the remainder of the petitioner's admission, which was: " . . . I decided not to do anything that was going to be contrary to the law or contrary to what I understood Mr. Hopkins was asking me not to do." (*Statement of Facts Vol. V-92*). Petitioner's conduct while on the owner's property at all times conformed to his stated intents and purposes as confirmed by the arresting officer's testimony and evidence to the contrary is not in the record. Petitioner was not charged as a party to other individual's charges nor for conduct of another, and cannot be guilty by association.

" . . . [I]t is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to

search the records in the state courts where a claim of constitutionality is effectively made." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 (1982). "Conviction upon charge not made constitutes denial of due process." *De Jonge v. State of Oregon*, 299 U.S. 353, 362 (1937), *Thompson v. City of Louisville*, 362 U.S. 199 (1960). "It has been established that guilt by association alone without establishing that an individual's association poses the threat feared by the Government is an impermissible basis which to deny First Amendment rights." *Healy v. James*, 408 U.S. 169, 186 (1972). " . . . [T]he critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." *Id.* at 191.

All the evidence, even by prosecution witnesses, is conclusive that appellant was not involved in any unlawful activity, protest or speech, and the video evidence confirms the testimony. The Appellate Court's rendition of the facts that petitioner was a leader of intruders and lawbreakers is without basis in the record or the state's video evidence, and the fact that petitioner was not arrested for such crimes makes abundantly clear that petitioner had no part in any criminal conduct reported in the appellate court opinion.

B. Petitioner was protected from criminal trespass by the First and Fourteenth Amendments because he was peacefully in a place of business open to the public, a location also defined statutorily as a "public place."

The Legislature has defined the "common areas of office buildings", not excluding such areas on private property, and provided that it means " . . . any place to which the public or a substantial group of the public has access . . . " Tex. Pen. Code 1.07(a)(29). The Legislature has defined "common areas of office buildings" as a place that the public has access and this Court has recognized

such locations as imposing limitations on private property:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.

Munn v. Illinois, 94 U.S. 113, 126 (1877).

Rights in public places are spelled out in *16A American Jur.2d, Constitutional Law* No. 570, page 483:

> Under the constitutional guaranty of liberty one may, under normal conditions, move at his inclination along the public highways, *or in public places*, and while conducting himself in an orderly and decent manner, neither interfering with nor disturbing another's rights, he will be protected, not only in his person, but in safe conduct. (Emphasis added).
>
> Statutes or ordinances regulating loitering, vagrancy, breach of the peace, or disorderly conduct in public places, challenged on due process grounds, have been sustained in some cases and invalidated in other, depending upon the language and scope of the provisions.

The early Texas case of *Murchinson v. State*, 5 S.W. 508 (1887) held that use of a "public place" under the statute " does not mean a place devoted solely to the uses of the public, but it means a place, which in point of fact, is public as distinguished from private – a place that is visited by many persons, and accessible to the public."

The Supreme Court of Georgia in *Bullock v. City of Dallas*, 281 S.E.2d 613 (1981) held that a conviction for loitering under a city ordinance prohibiting anyone from *remaining* or loitering on any premises to which the public

has access, including private owned business property, even where the presence is unrelated to the normal activity for which the premises are made available to the public, is not only unreasonable but also contravenes the First and Fourteenth Amendments of the U.S. Constitution.

The Texas Legislature has codified locations on private property in which the public has access and a right to remain unless there is unlawful activity. Texas appellate courts have held that private property defined as a "public place" under Tex. Penal Code 1.07(a)(29) are changed in character and authorize arrest for conduct, even the owner's conduct, that would not otherwise be permitted on private property. *Gonzales v. State*, 664 S.W.2d 797 (Tex. App. – Corpus Christi 1984) (Arrest for public intoxication on private business convenience store.); *Thibaut v. State of Texas*, 782 S.W.2d 307 (Tex. App. – Eastland 1989) (Parking lot of a private condominium was a "public place" for arrest of driving while intoxicated.) Texas appellate courts recognize properties defined by statute as "public places", do not have the protective character of purely private property because the public has the right to be on and remain on such property, unless involved in unlawful activity. There is no evidence in the record that petitioner was involved in unlawful activity. The Texas Constitution, art. 1, sect. 27 and 29 provide:

> The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.
>
> To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary

thereto, or to the following provision shall be void.

Just as with *sec. 8, sec. 27* is distinct from its federal counterpart in the First Amendment, affirmatively assuring that " . . . *citizens shall have the right,* in a peaceable manner, to assemble together for their common good . . . " (Emphasis added).

Not only do *secs. 8 and 27* confer affirmative rights on Texans and impose prohibitions on their government; but, together with the general structure of the Bill of Rights and the Constitution, they impose a " . . . duty to protect the additional state guaranteed rights of all Texans." *LeCroy v. Hanlon,* 713 S.W.2d 335, 339 (Tex. 1986); reaffirmed in *Davenport v. Garcia,* 834 S.W.2d 4, 11 (Tex. 1992). The additional state guaranteed rights of the Texas Constitution as interpreted by the Texas Supreme Court were not provided to petitioner by the Court of Appeals because there was insubstantial findings of facts screening reality and " . . . insults the dignity of the state charter and denies citizens the fullest protection of their rights." *Davenport v. Garcia,* 384 S.W.2d. 4, 11 (Tex. 1992).

Petitioner was arrested and convicted of criminal trespass for his peaceful presence only in a public place in violation of the First and Fourteenth Amendments regardless that the Texas Appellate Courts failed to provide him with the greater guarantees of the Texas Constitution. His conviction should be reversed.

C. Total speech rights cannot be prohibited by regulation or by arrest for trespass on private business property open to the public.

There are no Texas or federal laws that limits persons to business purposes only on privately owned business property open to the public but the appellate court sustained the conviction for trespass on such an unfounded concept.

As appellant sang with the protestors and admitted that he was at the clinic to see what he

> could do to prevent abortions, we find the evidence sufficient for the jury to have found that appellant's purpose was not to engage in business with Moore.

(Opinion p.14). Petitioner did nothing unlawful during the time on Hopkin's property and the only speech he was involved in was inaudible as testified to by the arresting officer (*Statement of Facts Vol. II, 153*):

> Zarsky: Do you recall if it (video) showed me in any protest activities?
>
> McKinney: I believe it shows you singing with the people that were singing by the door; at least mouthing the words.
>
> Zarsky: Could you hear me?
>
> McKinney: Hear you? No, sir.

The strongest state's evidence of petitioner's speech activity on Stonegate Center are assumptions that petitioner was singing with the people by the door, with no evidence that his singing was audible. Assuming that inaudible singing is speech, does petitioner lose his right to remain in a place open to the public?

The right to assemble peaceably is "cognate to those of free speech and free press." *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937). " . . . [C]onsistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime." *Id.* 365. Like the right to freedom of expression, the right of assembly "may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order, although it cannot, under the guise of regulation, be denied." *Hague v. C.I.O.*, 307 U.S. 496, 515-516 (1939).

In *Airport Com'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 562 (1987), a resolution banning all "First Amendment activities" within the central terminal area at the Los Angeles airport was held facially unconstitutional under the overbreath doctrine, *regardless of whether the*

airport was considered a public or a nonpublic forum (Emphasis added), because no conceivable governmental interest could justify such an absolute prohibition of speech, holding:

> On its face, the resolution at issue in this case reaches the universe of expressive activity, and, by prohibiting all protected expressive activity, purports to create a virtual "First Amendment Free Zone."
>
> The resolution therefore does not merely reach the activity of respondents at LAX, it prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution by engaging in some "First Amendment activity." We think it obvious that such a ban cannot be justified *even if LAX were a nonpublic forum* because no conceivable governmental interest would justify such an absolute prohibition of speech. *Id.*, at 574. (Emphasis added).

Petitioner was not arrested for singing, or any other expressive speech or conduct, but for his "presence only", however the appellate court affirmed his conviction on petitioner's intended purpose to speak with others about abortion, though in fact he did not do so. Even if petitioner spoke to others about abortion, his arrest for that reason in a place he had a right to be is the worst possible result of a total ban on First Amendment speech.

The Court has gone further and allowed some expressive speech as constitutional when it is done in a place a person has a right to be:

> Students have a constitutional right to expressive speech by wearing symbolic black armbands because *"It (school) is a public place,* and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be

> there are to be gauged as if the premises were purely private property.

Tinker v. Des Moines Independent Com. Sch. Dist., 393 U.S. 503, 511, Note 6 (1969). (Emphasis added).

It was not argued in the State appellate courts that the common area between the offices was a public forum, though it was argued with supporting evidence that it was a limited public forum because a proabortion demonstration was permitted one week before. (Defendant's video-audio Exhibit No. 22). However petitioner submits, even if the location is not a limited public forum, his presence and "pure speech" have greater constitutional protection than expressive speech. *Cox v. State of Louisiana*, 379 U.S. 536, 555 (1965).

The appellate court did not cite any statutory law that requires the public to have business purposes for being in a place open to the public, and stated on page 12 of the Opinion: "We can find no state that has granted free speech rights to a person merely because private property was used in a public manner." Appellant's brief cited several cases in addition to *Bullock v. City of Dallas, Supra,* that have granted First Amendment speech rights because private property was used in a public manner, among which were the following:

In re Frederick A. Hoffman, 434 P.2d 353 (1967). Habeas corpus to the California Supreme Court for conviction of passing out leaflets opposing Vietnam policies under an ordinance for being in a *privately owned* public transportation railroad terminal longer than reasonably necessary to conduct business, holding:

> . . . the test is not whether petitioners' use of the station was a railway use but whether it interfered with that use . . . In this respect, a railway station is like a public street or park . . . The railroads seek, neither privacy within nor exclusive possession of their station. *They therefore cannot invoke the law of trespass against petitioners to protect those interests. Id.*, at 356. (Emphasis added).

Wolin v. Port of New York Authority 302 F.2d 83 (Ct. Appls. – 2nd Dist. 1968). Declaratory judgment seeking the right to distribute leaflets, carry placards and conducting discussions with others publicizing antiwar views to the public in a bus terminal is an appropriate place for such activities, and are entitled to protection under First and Fourteenth Amendments.

> . . . where the issue involves the exercise of First Amendment rights in a place clearly available to the general public . . . the factors to be considered are essentially the same, be the forum selected for expression in a street, park, shopping center, bus terminal, *or office plaza. Id.*, at 89. (Emphasis added).
>
> The Port Authority argues that the Terminal is an inappropriate site for such activity because the interior of a building is not traditionally a place for exercise of First Amendment Rights . . . We disagree with these views because they evidence too little regard for the vagaries of effective communication, and for the versatility of the First Amendment's proscription. *Id.*, at 89.
>
> Others may quarrel with Wolin's choice of forum and vigorously dispute his message, but we believe the Port Authority may not abridge his right to choose this place any more than they can control his choice of message. *Id.*, at 91.
>
> Similarly, the availability of some alternative forum, and the likelihood of a swarm of protesters each with their special cry disrupting the normal operation of the Terminal, are not material where the issue involves a blanket and wholesale ban. *Id.*, at 91.

In re Donald Robert Lane, 457 P.2d 561 (1969). Habeas corpus brought by a defendant to the California Supreme Court for a conviction of *trespass for being on privately owned sidewalk area* opened by a supermarket for use by its customers. Held that defendant had the right under

free speech guarantees to distribute handbills on privately owned sidewalks of a supermarket because such "sidewalk" was a "public area" in which members of the public might exercise First Amendment rights.

> Certainly, this sidewalk is not private in the sense of not being open to the public. The public is openly invited to use it in gaining access to the store and in leaving the premises. Thus, in our view it is a public area in which members of the public may exercise First Amendment rights. Certainly the paramount and preferred place given to the First Amendment freedom of speech right in our democratic system should be accorded precedence over the mere "naked title" of market owner Stewart's interest in the premises.
>
> . . . when a business establishment invites the public generally to patronize its store and in doing so to traverse a sidewalk opened for access by the public the fact of private ownership of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the sidewalk at or near the place of entry to the establishment.

Id., at 565.

It is generally recognized that the Supreme Court's focus, in the line of cases beginning with *Marsh v. Alabama*, 326 U.S. 501 (1946) on the nature of property involved is an alternate way of establishing state action. See L.Tribe, *American Constitutional Law* §18-5 at 1708-11 (2nd ed. 1988). In this case the Appellate Court holds that the shopping center, or the location of the abortion clinic is not the functional equivalent of a "town square", but it must be admitted that it is not private like a private residence, as is emphasized in the above cited cases. Thus, while the shopping center may not be as large as some mega shopping centers, it is certainly a much larger area than shopping areas and "town squares" of many if

not most Texas towns, and should be subject to at least a diminished right of speech free from criminal trespass.[1] "At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places." *International Society for Krishna Consciousness, Inc., v. Lee,* 112 S.Ct. 2709, 2716 (1992), Justice Kennedy concurring. "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. State of Alabama,* 310 U.S. 88, 101 (1940). Arrest for

---

[1] A trial court judge in Austin, Texas dismissed four criminal trespass charges where defendants protested against grape growers and solicited signatures on a parking lot of a separate single private property grocery store abutting a street and sidewalk. Judge Steve Russell held: "Every activity that these defendants engaged in was constitutionally protected activity, classic speech. There was nothing, nothing that does not obviously fall under the rubric of speech. Therefore, in the analysis set out by Judge Hart, although there is a continuum with the private dwelling at one end, and perhaps a mega-mall at the other end, this one is not close. I find these defendants not guilty; all of them."

The police in Austin, Texas, where Judge Russell dismissed these charges, no longer make trespass arrests for such expressive speech activities in public areas like the grocery store. Reported in the Austin American Statesman, Saturday, December 9, 1989, Appendix A-1, and *State of Texas v. Barbara Ritter et al.*, Cause No. 325-669, 1989 Travis County, Texas – Court at Law No. 2, presented to the Appellate Court in Appellant's Motion for Reconsideration En Banc, Appendix A-1 through A-5. This case was not appealed and shows that Texas defense lawyers, prosecutors, and one trial judge understand such expressive speech activity is constitutionally protected on private business property. "The state is entitled to appeal a order of a court in a criminal case if the order: (1) dismisses an indictment, information or complaint. . . . " Art. 44.01, Texas Code of Criminal Procedure.

non-expressive speech in a place open to the public violates a basic principle at the heart of our jurisprudence and transformed the private dispute of the business property owner with petitioner into a public one in which criminal arrest denied petitioner First and Fourteenth Amendment protection.

D. Petitioner was denied Fourteenth Amendment equal protection of Texas greater constitutional speech rights by the Appellate Courts' misconstruction and screening of facts.

The Texas Supreme Court held in *Davenport v. Garcia*, 384 S.W.2d 4, 11 (Tex. 1992)

> Today we reaffirm our prior pronouncement that "[o]ur constitution has independent vitality, and this court has the power and duty to protect the additional state guaranteed rights of all Texans." *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986). We decline to limit the liberties of Texans to those found in the Federal Constitution when this court is responsible for the preservation of Texas' own fundamental charter. When a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights.

This Court held in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) that state constitutions may allow reasonable restrictions on private property, so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provisions.

A most important consequence state affirmative grants of speech, assembly and petition is that the question of state action is eliminated and the only question that remains is the balancing of the rights to exercise free

speech, assembly and petition, on the one hand, and on the other, the property rights of the owner.

Though the Appellate Court addressed petitioner's claim of Texas' broader speech freedoms, (Note 4, Page 7), the Texas Supreme Court case of *Davenport v. Garcia, Supra,* upholding petitioner's claim had not been decided. The Appellate Court did not address the cases submitted by petitioner permitting access and speech on private business property, but did point out factors to be considered for greater state expressive speech rights: (1) size of the shopping center, (2) amount of disruption to the business entities caused by the speech activity, (3) degree of public invitation extended by the center, (4) the degree that the property has been dedicated to public use, (5) safety matters and, (6) the owner's property rights. (Opinion, Page 9).

If the factors applied for expressive speech is applied in the present case for broader state constitutional protection, all factors are sufficient. (1) Size: Though the arrest was on property separately owned apart from other property owners of the shopping center, it was not possible to distinguish such ownership (1.70 acres, Defense Exhibit 23) by any physical boundaries, and all patrons of the shopping center have an open invitation to the 13.70 acres of the general businesses shopping center. (Defense Exhibits 1-18, 23); (2) Disruption caused: Petitioner was arrested for "presence only", and there is no evidence alleged or proven of any disruption by petitioner, and is clear from the State's video of petitioner during the time on the premises; (3) Public invitation: No restrictions to the general public, testified to by the arresting officer, (*Statement of Facts Vol. II, 149*) and obvious from the pictures and video evidence; (4) Degree of dedication to public use: The common areas of office buildings has been dedicated by State legislation as a "public place", it was previously identified by a state prosecutor as a "public walkway" (*Defense Exhibit 26 Statement of Facts Vol. V, 66, 73*), and is open to the public; (5) Safety matters: It would be hazardous because of traffic congestion to

attempt communication with patrons driving into the shopping center; (6) Owner's property rights were not diminished by petitioner's quiet, peaceful presence regardless of property violations by others who were arrested by the police to protect the owner's property rights.

Though these factors appear clearly sufficient to apply broader state constitutional rights of speech under the Constitutions of California or Texas under the Texas Supreme Court interpretation, the broader protection is not provided to petitioner by the Appellate Court or the Court of Criminal Appeals, and leaves petitioner without the broader protection in a criminal charge than would be afforded in civil litigation in California in *PruneYard Shopping Center v. Robins, Supra,* the other cited cases, and the greater protection of Texas constitutional rights enunciated by the Texas Supreme Court. *Davenport v. Garcia, Supra.*

Though the Appellate Court addressed the greater protection rights of the Texas Constitution, it screened the reality of the facts to deny Texas constitutional greater protection as pointed out above, by finding the petitioner a leader of lawbreakers and intruders on the property, and misconstrued assessment of the other facts, which would provide petitioner entitlement. The requirements for greater Texas constitutional protection applied by the Appellate Court were based on requirements for expressive speech rights in all the cases cited by the Appellate Court, however there was not one case cited for precedent by the Appellate Court that compared with the no speech or "pure speech", and arrest for "presence only" in the present case. Another vital factor that was not addressed by the Appellate Court was petitioner's inability to communicate with the property owner's clients in any other location, which will now be addressed.

E. The First and Fourteenth Amendments of the United States Constitution protect speech rights on private business property where there are no other adequate means of communication with business patrons.

Reproductive Services is located approximately 400-500 feet distant from the public streets of Everhart and Corona, and is about in the center of the shopping center. (*Statement of Facts Vol. II, 150, 201; Defendant Exhibits-19, 23*). The entrance to the abortion clinic and the adjacent parking facilities cannot be seen from the public streets and sidewalks, prohibiting all communications between clients of Reproductive Services and anyone wishing to communicate with such clients from the closest public streets and sidewalks. (*Statement of Facts Vol. II, 230; Defendant's Exhibit 19*). Any attempt to communicate with customers coming to the shopping center while the customer is driving onto the property would be a traffic hazard by backing up traffic on Everhart street. (*Statement of Facts, Vol. II, 210*).

Though petitioner was not engaged in any unlawful activity or expressive speech, the Appellate Court affirmed his conviction based on his intentions of communicating with patrons of the abortion clinic. If petitioner was not protected from trespass because he was in a public place which affords protection for access and speech, then he was in a place which was the only place he could communicate with the customers of the abortion clinic because there was no other public forum location for such communication.

The Appellate Court cites cases from states that did not extend speech protections to protesters on abortion clinics business property, but an analysis of the cases shows the abortion clinics were not secluded far away in shopping centers, but were rather individually located businesses adjacent to public sidewalk forums providing adequate means of effective communication. The common rule in each of the below cited abortion clinic speech

cases follows the Supreme Court precedent enunciated in *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949) holding:

> The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention.

In *Planned Parenthood of San Diego and Riverside Counties v. Wilson*, 282 Cal. Rptr. 760, (Cal. App. Dist 4, 1991), the court finds the public sidewalk is located immediately in front of the Medical Center, and holds:

> Mindful that the right of free speech involves a guarantee of providing a forum so one may obtain and perhaps reach the minds of willing listeners, the protesters' exclusion from the parking lot has not deprived them of ample opportunity within the traditional public forum of the public sidewalk to do so. *Id.*, at 768.

In Brown v. Davis, 495 A2d 900 (NJ Super Ct. 1984) the abortion clinic was 45 feet from the public sidewalk and the court held:

> In the present case there is no pressing public policy reason for permitting plaintiffs to enter the premises, since alternative means of communication are available. *Id.*, at 904.

In Allred v. Shawley, 284 Cal Rptr. 140 (Cal. App. Dist 4, 1991) the court found there was sufficient opportunity to reach the targeted audience, that the public sidewalk along the front of the building was but 32 feet from the lobby of the building, and that the lobby was entirely unshaded glass, from which patients could easily see placards and billboards, and held:

> Appellants are not denied access to their quarry. "[T]he protesters' exclusion from the parking lot has not deprived them of an ample opportunity within the traditional public forum of the public sidewalk to reach [willing listeners]." *Id.*, at 148.

See also *Sunnyside v. Lopez*, 751 P.2d 313 (Wash. App. 1988) and *Rains v. Mercantile Nat'l Bank*, 599 SW2d 121,

124 (Tex. Civ. App. Dallas, 1980, writ re'f n.r.e.) (Right of access to private property "where there are not reasonable means of exercising first amendment rights".)

The Appellate Court misconstrues the law of *Lloyd v. Tanner*, 407 U.S. 551 (1972), sustained in *Hudgens v. National Labor Relations Bd.*, 424 U.S. 507 (1976) (Opinion p.5) that by these cases petitioner has no First Amendment right of remaining on private business property because the facts are dissimilar and inapposite. *Lloyd* dealt with protest and expressive speech, but petitioner's facts did not. *Lloyd* dealt with speech where there was no business related purpose, but petitioner's did. *Lloyd's* fact situation provided adequate alternative avenues of communication, but petitioner's situation did not. Expressive speech and protest were factual and the Court addressed the business relation and alternative means of communication to distinguish a previous case:

> A further fact, distinguishing the present case from Logan Valley is that the Union pickets in that case would have been deprived of all reasonable opportunity to convey their message to patrons of the Weis store had they been denied access to the shopping center. The situation at Lloyd Center was notably different. The central building complex was surrounded by public sidewalks, totaling 66 linear blocks. All persons who enter or leave the private areas within the complex must cross public streets and sidewalks, either on foot or in automobiles. When moving to and from the privately owned parking lots, automobiles are required by law to come to a complete stop. Handbills may be distributed conveniently to pedestrians, and also to occupants of automobiles, from these public sidewalks and streets. Indeed, respondents moved to these public areas and continued distribution of their handbills after being requested to leave the interior malls. It would be an unwarranted infringement of property rights to

> require them to yield to the exercise of First Amendments rights *under circumstances where adequate alternative avenues of communication exist.* (Emphasis added.)

Lloyd Corp. Ltd. v. Tanner, 407 U.S. 551, 556 (1972). See also *Lee v. International Society for Krishna Consciousness, Inc.* 112 S.Ct. 2709 (1992). (Distribution of literature in an airport terminal could not be prohibited even though there were adequate means of communication immediately outside the terminal on the airport sidewalks, where ninety-seven percent of the passengers could be given literature.)

The Appellate Court misconstrues Supreme Court and other state court decisions " . . . all have declined to extend such protections to property like that in the present case." (Opinion p.9). The facts in this case are clearly different from others cited by the Appellate Court, including *Hudgens v. NLRB, Lloyd v. Tanner, Central Hardware Co. v. National Labor Rel. Bd.*, 407 U.S. 539 (1992), *Gibbons v. State*, 775 SW2d 790 (Tex. App. – Dallas 1989), *Hoffart v. State*, 686 SW2d 259 (Tex. App. – Houston [14th Dist.], Writ r'fd 107 S.Ct. 95, 478); *Rains v. Mercantile Nat'l Bank*, 600 SW2d 121 (Tex. Civ. App. – Dallas 1980), *Right to Life Advocates, Inc. v. Aaron Women's Clinic*, 737 SW2d 564, 568 (Tex. App. – Houston [14th Dist.] 1987, Writ denied 109 S.Ct. 71), because in those cases there were adequate public forums to communicate with the patrons of the businesses, or the speech purposes did not pertain to any business in the location.

Here the abortion clinic is secluded away 500 feet from any public sidewalks or public forum locations and prevented petitioner from all communication with abortion clinic clients. Any attempt to communicate with the clients while they are driving to the abortion clinic from Everhart street would be a traffic hazard and a potential cause of injury to the clients and others. Petitioner caused no disruption to any business by his quiet and peaceful presence on the parking lot and the public walkway, and exhibited no expressive speech or conduct. Petitioner

wanted to communicate with persons going into the abortion clinic but there was no alternative place for him to be able to communicate with the persons he wanted to, except to be where he was. Petitioner met the requirements of *Lloyd v. Tanner, Supra, Kovacs v. Cooper, Supra,* and other cited state cases dealing with expressive speech issues on private business property, though he was not participating in expressive speech or conduct, because he was attempting to communicate with business related clients on the property where he was arrested, and there were no other means available for such communication, and was therefore constitutionally protected by the First and Fourteenth Amendments.

F. The abortion clinic property became a limited public forum when it was used with the owner agent's permission for a pro-abortion rally.

The Appellate Court holds on page 11, that the pro-abortion rally held on the abortion clinic property a week before petitioner's arrest was without the owner's permission, but the record is clear that owner Hopkins admitted he had given the abortion clinic operator, Rachael Vargas, express written authority to control the entire property. (*Statement of Facts Vol. II, 39-40; Vol. IV, 48*), and Rachael Vargas promoted, coordinated and participated in a loud pro-abortion demonstration on the abortion clinic premises a week before. (Defendant Exhibit-22, video; *Statement of Facts Vol. IV, 51-58*). Texas law holds under the agency principle of "respondeat superior" a principal is liable for the agent's actions regardless of whether the agent had authority to do the specific act complained of. *King v. Loessin*, 572 SW2d 87, 90 (App. – Houston 1st Dist. 1978). It is very convenient for an owner to authorize a tenant agent authority to do what he approved of, but then deny such authority to avoid any responsibility for what he disapproved of.

The court holds on page 11 " . . . that this one rally, without the owner's permission, did not transform the

office complex into a 'town square' for free-speech purposes", but other courts do not have such a high requirement of a "town square" comparison before equal protection is afforded. Restraint of constitutional rights of speech in non-public forums is permitted so long as it is applied without discrimination and is not used to purposefully suppress speech. *U.S. v. Albertini*, 472 U.S. 675, 688-89 (1985). Non-public forums have been opened up to all persons for activities protected by the First Amendment if made available to other persons for such purposes. *Widmar v. Vincent*, 454 U.S. 262 (1981); *United States v. Albertini*, 472 U.S. 674 (1985).

In Brown v. Davis, 495 A2d 900 (NJ Super Ct. 1984) the court held expressional activity to some persons by private property owners must be afforded without discrimination to others on the same issues:

> The protection of the rights of a private property owner is concomitant to the owner's obligation to honor the rights of others to speak and assemble on his property. In weighing the reasonableness of the owner's restrictions to access to private property, effect must be given to whether "there exist convenient and feasible alternative means to individuals to engage in substantially the same expressional activity."

Id., at 903.

Owner Hopkins cannot avoid responsibility for the pro-abortion rally on his property, and discriminate against petitioner by having him arrested for his intentions to speak on the issue of abortion, when through his authorized agent he opened his property to many others to speak and promote the same issue. The State's video evidence shows clearly many persons on the premises who were not arrested, but petitioner was singled out, not for impeding access to the center's tenants, nor harassing or verbally abusing potential clients, but to suppress his speech even though a week before the owner's premises were opened to loud yelling and demonstrations promoting the abortion business on the same

location. Petitioner's interest in free speech to offer alternatives to abortion and aid to mothers should be given the same legal protection as those who loudly promote abortion on the same business location.

II. The trespass statute, as applied, is unconstitutional because it is not narrowly applied and because it significantly impairs constitutionally protected speech.

A. The trespass statute as applied here is unconstitutionally overbroad.

Petitioner also urges that the trespass statute as applied is void for "overbreath", that is, "it offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Zwickler v. Koota*, 389 U.S. 241, 249 (1967).

A statute is overbroad if it "does not aim specifically at evils within the allowable area of state control but . . . sweeps within its ambit other activities that . . . constitute an exercise of speech or press rights." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

This Court has approved only two ways in which the state may achieve this balance.

The first approach is through use of reasonable time, place, and manner regulations, narrowly drawn to serve significant governmental interests. *Cox v. Louisiana*, 379 U.S. 559, 563 (1965).

The second approved method is by carving out of the scope of the statute the conduct which enjoys First Amendment protection. *Cameron v. Johnson*, 390 U.S. 611 (1968). Neither method was taken in this case. *Thornhill's* admonition especially applies:

> But the group in power at any moment may not impose penal sanctions on peaceful and

> truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.

Thornhill v. State of Alabama, Supra at 104, 105.

Since a pro-abortion demonstration was permitted in the same location only a week before, it is clear that the owner willingly discriminated against the content of petitioner's intentions to provide alternative information and aid to individuals seeking solutions to unwanted pregnancies.

In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), the Supreme Court articulated the balancing test for reviewing government regulations of conduct which incidentally restricts protected speech:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interests; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the interest.

The statute at issue here fails O'Brien's fourth criterion because the resulting restrictions on protected speech are much greater than are essential to the government's interest.

As applied, the trespass statute displays no tailoring whatever to the interest of the state.

To be invalid, the overbreath of the statute must be substantial, judged in relation to its plainly legitimate sweep. *Broadrick v. Oklahoma*, 413 U.S. 600, at 615 (1973).

But where the statute unquestionably attaches sanctions to protected conduct, the likelihood that it will deter protected speech or conduct is ordinarily sufficiently great to justify an overbreath attack. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 n.19 (1984), citing *Erzoznick v. City of Jacksonville*, 422 U.S. 205, 217 (1975); *Airport Com'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987). It is clear that the statute here can punish protected conduct, i.e., criminal trespass for remaining on a parking lot common areas of office buildings of a shopping center open to the public and, defined as "public place" by Tex. Pen. Code 1.07(a)(29), and restraint of all forms of speech thereon.

A state statute should be deemed invalid if it is not readily subject to a narrowing construction by the state courts and its deterrent effect on legitimate expression is real and substantial. *Erzoznick*, 422 U.S. at 216.

The Court used a Texas case to again emphasize its protection of the First Amendment from vague and overbroad criminal statutes, invalidating a Houston disorderly conduct ordinance which "criminalized a substantial amount of constitutionally protected speech, and accorded the police unconstitutional discretion in enforcement." *City of Houston v. Hill*, 482 U.S. 451, 466 (1987).

The statute as applied here is substantially overbroad, and a conviction thereunder should be reversed as an unconstitutional abridgment of petitioner's rights.

B. The statute as applied is unconstitutionally vague.

Petitioner also urges that the trespass statute is unconstitutionally vague. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolander v. Lawson*, 461 U.S. 352, 357 (1983).

"Where a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the doctrine requires a greater degree of specificity than in other contexts." *Smith v. Goyuen*, 415 U.S. 566, 573 (1974). "A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application" (footnotes omitted.) *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

As already discussed in the overbreath section, this Court invalidated a Houston disorderly conduct ordinance in part on vagueness grounds because it accorded "the police unconstitutional discretion in enforcement." *City of Houston, Supra*. The Texas trespass statute accorded the police, the courts and juries unconstitutional discretion for arrest and conviction of petitioner.

CONCLUSION

For the reasons and authorities set forth, the Petition for a Writ of certiorari should be granted.

Respectfully submitted,

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Petitoner Pro-Se, Attorney of Record

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COURT OF APPEALS

THIRTEENTH SUPREME JUDICIAL DISTRICT

TENTH FLOOR

NUECES COUNTY COURTHOUSE

CORPUS CHRISTI, TEXAS 78401

February 20, 1992

TO ALL ATTORNEYS OF RECORD:

Re: Cause No. 13-91-111-CR
Tr. Ct. No. 90-3938-3
Clifford L. Zarsky
v.
The State of Texas

Dear Counsel:

The judgment of the trial court in the above-referenced cause was this day AFFIRMED by this Court.

Copies of the opinion and judgment are enclosed.

Very truly yours,

/s/ Cathy Wilborn
Cathy Wilborn, Clerk

CW:rgl
enc.

cc: Hon. Carlos Valdez
Hon. Clifford L. Zarsky
Hon. Gene A. Garcia
Hon. Hilda Tagle, Presiding Judge
Hon. Ernest Briones, County Clerk
Hon. Richard M. Berry

COURT OF APPEALS

Thirteenth Judicial District

Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Judicial District of Texas, at Corpus Christi, as of the *20th day of February, 1992*. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-91-111-CR (Tr. Ct. No. 90-3938-3)

CLIFFORD LOUIS ZARSKY, Appellant,

v.

THE STATE OF TEXAS, Appellee,

on appeal to this Court from Nueces County, Texas.

* * *

JUDGMENT

On appeal from the County Court at Law No. 3 of Nueces County, Texas, from a judgment signed January 9, 1991.

Opinion by Assigned Justice Gerald T. Bissett. Opinion ordered published. Tex. R. App. P. 90.

THIS CAUSE was submitted to the Court on September 12, 1991, on oral argument, the record, and briefs. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below, and said judgment is hereby AFFIRMED against appellant, CLIFFORD LOUIS ZARSKY.

Costs of the appeal are adjudged against appellant, CLIFFORD LOUIS ZARSKY. It is further ordered that this decision be certified below for observance.

* * *

CATHY WILBORN, CLERK

NUMBER 13-91-111-CR

COURT OF APPEALS

THIRTEENTH JUDICIAL DISTRICT OF TEXAS

CORPUS CHRISTI

* * *

CLIFFORD LOUIS ZARSKY, Appellant,

v.

THE STATE OF TEXAS, Appellee.

* * *

On appeal from the County Court at Law No. 3
of Nueces County, Texas.

* * *

Before Gerald T. Bissett;[1] J. Bonner Dorsey;
and Gilberto Hinojosa, J.J.

* * *

OPINION

A jury found appellant guilty of criminal trespass, and the trial court assessed his punishment at thirty days in jail. Appellant asserts that his conviction violates the free-speech and assembly provisions of the United States and Texas Constitutions, that the evidence is insufficient to sustain the conviction, and that the trial court erred in excluding evidence and in failing to submit his requested instructions to the jury. We affirm.

Appellant was arrested at the Stonegate Professional Office Complex in Corpus Christi (Stonegate), while anti-abortion protestors sat on a walkway outside an abortion clinic, blocking its doors. Appellant, who was described as part of the protest leadership, was arrested as he stood in the parking lot, about eight feet from one of the clinic's doors, next to a pole which supported the roof covering the walkway. Appellant was not personally blocking the clinic's door. Less than a half-hour before his arrest, William Hopkins, the owner of the complex, notified appellant at a face-to-face meeting to leave the premises.

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[1] Assigned to this Court by the Chief Justice of the Supreme Court of Texas pursuant to Tex. Gov't Code Ann. § 74.003 (Vernon 1988).

Appellant was charged with violating Texas' trespass law by remaining on Hopkins' property without Hopkins' consent after he had notice to depart but failed to do so. *See* Tex. Penal Code Ann. § 30.05(a)(2) (Vernon 1989).

In his first point of error, appellant contends that his activities at the clinic were protected under the First Amendment of the United States Constitution and under Article I, §§ 8, 27, and 29 of the Texas Constitution.[2]

We find the federal constitutional issue resolved by Hudgens v. National Labor Relations Bd., 424 U.S. 507 (1976). In *Hudgens,* warehouse employees of a company with a retail store in a shopping center were found to have no First Amendment right to enter the shopping center to advertise their strike against the company. *Hudgens* followed Lloyd Corp. v. Tanner, 407 U.S. 551

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[2] Article 1, § 8 of the Texas Constitution provides:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. . . .

Article 1, § 27 provides:

> The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.

Article 1, § 29 provides:

> To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

(1972), in which the Court held that persons protesting the Vietnam War did not have a First Amendment right to distribute handbills in a large shopping center. In *Hudgens*, the Court reiterated that it was rejecting the rationale of and overruling Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), in which the Court had held that peaceful picketers in a large shopping center were protected by the First Amendment. Although appellant argues that *Hudgens* and *Lloyd* did not overrule *Logan Valley*, the Supreme Court has acknowledged that *Logan Valley* has been overruled. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Flagg Bros. v. Brooks, 436 U.S. 149, 159 (1978).

Under the First Amendment to the United States Constitution, before a private property owner can be subjected to another's freespeech rights, the privately-owned property must assume to some significant degree the functional attributes of public property devoted to public use. Central Hardware Co. v. National Labor Relations Bd., 407 U.S. 539, 547 (1972); *see Hudgens*, 424 U.S. at 516; Gibbons v. State, 775 S.W.2d 790, 793 (Tex. App. – Dallas 1989), *pet. ref'd*, No. 1243-89 (Tex. Crim. App. September 25, 1991) (not yet reported); Hoffart v. State, 686 S.W.2d 259, 262 (Tex. App. – Houston [14th Dist.] 1985, pet. ref'd); Rains v. Mercantile Nat'l Bank, 600 S.W.2d 121, 123-24 (Tex. Civ. App. – Dallas 1980, writ ref'd n.r.e.). The evidence in the instant case shows that the property was generally used for commerce and that on one prior occasion, pro-choice demonstrators had gathered at the site. Hopkins had not given his permission for that demonstration. There is no evidence that the

office complex assumed the functional attributes of public property devoted to public use. We find no First Amendment protection for appellant's activities.

We thus turn to the protections afforded appellant by the Texas Constitution.[3] The Texas Constitution's affirmative grant of free speech is more broadly worded than the First Amendment's proscription of Congress from abridging freedom of speech. O'Quinn v. State Bar of Texas, 763 S.W.2d 397, 402-403 (Tex. 1988). While no Texas case has held that Texas must grant broader speech freedoms than the First Amendment, appellant urges us to do so, relying in large part on California's decision to interpret a provision of its Constitution broader than its federal counterpart.[4] *See* Robins v. Pruneyard Shopping Center, 592 P.2d 341 (Cal. 1979). The California and Texas Constitutional provisions are almost identical.

In *Robins*, the Supreme Court of California concluded that its State Constitution protected speech and petitioning, reasonably exercised, in a *large*, privately-owned shopping center. *Robins*, 592 P.2d at 347. Our research reveals that a number of states have constitutional provisions worded similarly to those of Texas and California. Only a handful of those states have adopted positions

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[3] A state may adopt by its own constitution liberties more expansive than those conferred by the federal constitution. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

[4] Although two Texas cases have held that the Texas Constitution is interpreted co-extensively with the First Amendment, we will address the merits of appellant's complaint. *Gibbons*, 775 S.W.2d at 793-94; Reed v. State, 762 S.W.2d 640, 644 (Tex. App. – Texarkana 1988, pet. ref'd).

consistent with California's decision in *Robins*. *See* Batchelder v. Allied Stores Intern. Inc., 445 N.E.2d 590 (Mass. Sup. Jud. Ct. – Essex 1983); Alderwood Assocs. v. Washington Environmental Council, 635 P.2d 108 (Wash. 1981); State v. Schmid, 423 A.2d 615 (N.J. 1980).

Most states having constitutions similar to California's and Texas' have refused to adopt California's approach. *See* Bock v. Westminster Mall Co., 797 P.2d 797 (Colo. App. 1990, cert. granted); Fardig v. Municipality of Anchorage, 785 P.2d 911 (Alas. App. 1990); Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719 (Ariz. App. 1988, rev. denied); Jacobs v. Major, 407 N.W.2d 832 (Wis. 1987); Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331 (Pa. 1986); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985); Shad v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985); Cologne v. Westfarms Assocs., Inc., 469 A.2d 1201 (Conn. 1984). In these states, the business property owner has a right to exclude thirdparties from exercising forms of speech on the property.

The few states which have followed *Robins* to permit an exercise of free speech at large shopping malls have refused to extend the same speech protections to protestors at abortion clinics. *See* City of Sunnyside v. Lopez, 751 P.2d 313 (Wash. App. 1988); State v. Brown, 513 A.2d 974 (N.J. Super. Ct. 1986); Brown v. Davis, 495 A.2d 900 (N.J. Super. Ct. 1984); Ingram v. Problem Pregnancy of Worcester, Inc., 488 N.E.2d 408 (Mass. 1986). In *Sunnyside*, the Court held, "the center is private property and its owners may bar the exercise of free speech regardless of its nature or whether it is possible to reasonably regulate

it." *Sunnyside*, 751 P.2d at 319. Even California has refused to extend *Robins* to private abortion clinics. *See* Allred v. Shawley, 284 Cal. Rptr. 140, 143 (Cal. App. Dist. 4, 1991); Planned Parenthood of San Diego and Riverside Counties v. Wilson, 282 Cal. Rptr. 760, 766 (Cal. App. Dist. 4, 1991).

Our review thus shows that no state with a constitution similar to ours has been willing to extend speech protections to the extent which appellant advocates. In the states which have recognized speech protections greater than the First Amendment, all have declined to extend such protections to property like that in the present case. The courts, in rejecting the free-speech claims, have considered factors such as the size of the shopping center, the amount of disruption to the business entities caused by the speech activity, the degree of public invitation extended by the center, the degree that the property has been dedicated to public use, safety matters, and the owner's property rights. *See, e.g., Allred*, 284 Cal. Rptr. at 142-147.

In considering the factors used by the states above, we find no reason to protect appellant's speech or conduct under the Texas Constitution. The Stonegate complex is substantially different from the large shopping malls considered in other states. The Stonegate complex contained three buildings which were subdivided to provide office space for about a dozen tenants who shared a common parking lot. Stonegate is a modest business center, whose tenants are primarily engaged in medical or real estate businesses. Stonegate does not appear to have any attributes of a "town square." In *Robins*, by contrast, the Pruneyard Center was a large shopping mall which

catered to approximately 25,000 persons daily. Stonegate is physically and functionally different.

We also find that appellant's conduct, and that of the protestors here, differed substantially from the free-speech advocates in *Robins*. The speech in *Robins* was peaceful and did not interfere with the business of the center. Here, although appellant contends that he was merely standing on the complex property, not blocking the clinic's door, we find that, when viewed in context, appellant was a leader of the group which came onto Stonegate to interfere with a tenant's normal business operations. These intruders were not merely picketing, handbilling, or engaging in peaceful speech. They were sitting on the ground blocking entry to the building that housed the clinic.

We now turn to several specific matters raised by appellant in sub-points under point of error one. Appellant contends that because pro-choice demonstrators had met at the abortion clinic one week before his arrest, the complex was either a public forum or a limited public forum dedicated to public debate on the abortion issue. In the cases from other jurisdictions, there was no showing that the property in question was used to air pro-abortion views. Although we acknowledge the factual difference, we disagree with appellant's conclusion. Even in California, for example, "It is only when the owner of private property has created a 'forum' for the expression of ideas similar to the traditional 'town square' that members of the public are constitutionally [under the California Constitution] protected in the expression of their ideas in a manner contrary to the wishes of the property owner." *Wilson*, 282 Cal. Rptr. at 766; see also Johnson v.

Tait, 774 P.2d 185, 190 (Alas. 1989) (tavern not same character as shopping mall so owner could exclude others); *see also Western Pennsylvania Socialist Workers 1988 Campaign*, 515 A.2d at 1335, where the Supreme Court of Pennsylvania, in a case analagous to the instant case, held that a shopping mall open to the public solely for commercial purpose is not a public forum. Another case on point is *Brown v. Davis*, 495 A.2d at 903-04, where the issue was whether a private citizen ("plaintiff"), who was charged with criminal trespass, may enter upon the parking and work areas of a multi-business office complex ("Avenues of Commerce") to espouse an anti-abortion thesis directed to prospective patients of one of the tenants without the consent of the landlord-owner. The court held that the plaintiff was not entitled to enter defendants' private property against defendants' wishes to engage in the described expressional activity. *Id.* at 904. The court, in so holding, reasoned:

> [T]he Avenues of Commerce is not the functional equivilant of a suburban shopping center, which may be characterized as an alternative to an urban downtown shopping area where the public at large is invited. The Center is normally used by employees of tenants and prospective customers visiting specific businesses for the limited services made available to them. It is not a place to which a general consumer would go to shop for personal, household or general business merchandise.

Id. 903.

While the record in this case shows that one prior pro-choice rally was held on the clinic's property, we hold that this one rally, without the owner's permission,

did not transform the office complex into a "town square" for free-speech purposes.

Appellant further contends in support of his position that because he was arrested in a public place as defined by the Texas Penal Code his speech was protected. We disagree. The accessibility of the public to the place has no impact upon our consideration of this issue. The free-speech advocates in all of the above cases asserted their rights in "public places." The mere fact that a business is "open to the public" does not mean that the business has assumed "to some significant degree" the functional attributes of public property devoted to public use. *See Central Hardware*, 407 U.S. at 547. We can find no state that has granted free-speech rights to a person merely because private property was used in a public manner.

Appellant next contends that the trespass statute, as applied to him, is unconstitutional because it significantly impairs protected speech. We find this point without merit, as it is premised on a finding that his conduct was protected. As we have found that it was not, we also find this argument without merit. *See* Right to Life Advocates, Inc. v. Aaron Women's Clinic, 737 S.W.2d 564 (Tex. App. – Houston [14th Dist.] 1987); Hoffart v. State, 686 S.W.2d 259, 262 (Tex. App. – Houston [14th Dist.] 1985, pet. ref'd), *cert. denied*, 479 U.S. 824 (1986).

We find no merit to appellant's first point, and it is overruled.

In his second point of error, appellant contends the evidence is insufficient to support his conviction. In reviewing the sufficiency of the evidence, an appellate court views the evidence in the light most favorable to

the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Baugh v. State, 776 S.W.2d 583, 585 (Tex. Crim. App. 1989); Butler v. State, 769 S.W.2d 234, 239 (Tex. Crim. App. 1989).

Specifically, appellant asserts that because he had the permission of a tenant to come onto the property for business purposes, he was not on the property without consent. The evidence showed that Stonegate housed about a dozen separate businesses. Bryan Moore leased an office in the center for his real estate business. Moore and appellant had business dealings in the past and apparently had an on-going periodic business relationship. The record shows that around the time of the incident appellant visited Moore at his office about once a month.

Hopkins testified that Moore, as well as any other tenant, could invite someone onto the property and allow him to park and walk on the property. The parking lot is common to all the businesses, and apparently any member of the public-at-large could enter the property to patronize any business. Appellant testified that he was going to see Moore on the morning of his arrest and was just waiting on the property when he was arrested. Thus, appellant contends that the undisputed evidence showed that he had consent to be on the property.

In support of his position, appellant relies on Hann v. State, 771 S.W.2d 73 (Tex. App. – Fort Worth 1989, no pet.). In *Hann*, the defendant and the complainant had a *bona fide* dispute concerning whether the defendant had easement rights on certain property. The Court of

Appeals held that because of the unsettled legal dispute, no rational trier of fact could have found that the defendant was on the property without effective consent. We do not find *Hann* controlling.

Here, Hopkins was the owner and general manager of Stonegate. He testified appellant had his consent to come onto the property for business purposes. On the morning of appellant's arrest, Hopkins approached appellant, identified himself and requested that appellant leave the property. Hopkins testified that he had the authority to take care of the property; appellant, in his testimony, acknowledged that Hopkins had the authority to ask him to leave. Appellant further testified that he was not looking for Moore when he went to the back of the property where the abortion clinic was located but instead went back to see what he could do to prevent abortions.

We find this evidence sufficient to sustain the conviction. Appellant was not prosecuted for entering the property. He was prosecuted for remaining on the property after being notified to leave. The jury was free to determine whether appellant was at the site to conduct legitimate business dealing with Moore or to engage in activities related to the abortion protest. As appellant sang with the protestors and admitted that he was at the clinic to see what he could do to prevent abortions, we find the evidence sufficient for the jury to have found that appellant's purpose was not to engage in business with Moore.

Furthermore, we find that Hopkins' direct notice to appellant to leave the premises deprived appellant of any

right to be on the property at that time regardless of any past general invitation to come onto the property for business purposes. We find no *bona fide* dispute concerning appellant's right to be on the property. The evidence is sufficient to sustain the conviction. Appellant's second point of error is overruled.

In his third point, appellant contends that he was denied due process because a police officer failed to provide him with a chance to leave the property before being arrested. Appellant claims that Corpus Christi Police had a policy of arresting persons at abortion clinics only if an officer was assaulted or if a person vandalized or attempted to break into a clinic and that, as he did not fall within these criteria, his arrest did not conform to the announced police policy, and thereby violated his due process rights. We find appellant's complaint without merit.

Without regard to whether the law would support such a conclusion on those facts, we overrule appellant's point. Our review shows that appellant has misconstrued police department policy. Corpus Christi Police Chief Henry Garrett testified that the policy gave officers at the scene discretion to make arrests to keep the peace or enforce the law. Any person who pushed an officer or caused property damage, however, would be arrested. Thus, it was police department policy to arrest anyone assaulting an officer or causing property damage. Anyone not committing these acts was subject to arrest at the officer's discretion. Because appellant's point is premised on his incorrect construction that only certain violators were subject to arrest, we need not address this point any further. Appellant's third point is overruled.

In his fourth and fifth points, appellant contends that the trial court erred when it refused to submit two of his requested charges to the jury. Appellant's first requested charge defined "public place" pursuant to the Texas Penal Code and then instructed the jury to find appellant "not guilty" if they found that he through mistake formed a reasonable belief that he was in a public place and that his belief negated the culpability required for the commission of the offense. The trial court refused to giveappellant's requested charge.

"Mistake of fact" is a defense defined by the Penal Code. Tex. Penal Code Ann. § 8.02 (Vernon 1974). Section 8.02(a) provides:

> It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense.

Appellant contends that the "mistake of fact" was raised by his testimony that he believed he was in a public place and that he had a right to be where he was. We find that appellant was not entitled to the requested instruction. The evidence does not show that appellant was mistaken about any *fact* which negated an element of the offense. If appellant believed that he was not trespassing because the location was a public place, that belief would have been a mistake of the law rather than a mistake of fact. The trial court instructed the jury on "mistake of law." Appellant was not entitled to the "mistake of fact" charge requested.

Appellant next contends that he was entitled to the following "mistake of fact" charge:

> Further if you believe from the evidence that on the occasion in question the defendant committed the acts alleged, but you further believe, or you have a reasonable doubt thereof, that, at the time of the alleged acts, he had through mistake formed a reasonable belief about a matter of fact, to wit: that his continued presence on the property would not be a trespass because the alleged owner, Mr. Hopkins, did not advise the defendant that he would be arrested if he did not depart, and that said mistaken belief negated the culpability required for the commission of the offense stated in Paragraph ___ of this charge, you will find the defendant not guilty.

Appellant testified that he believed his continued presence on the property was not trespass because Hopkins did not advise him that he would be arrested if he did not depart. We do not find any evidence that appellant "formed a reasonable belief about a matter of fact which negated the kind of culpability required for the commission of the offense." The culpability required for this offense was that appellant knowingly remain on Hopkins' property without his consent after being notified to leave. Appellant was not mistaken about his continued presence on the property or the departure notice given. He was mistaken about whether he would be arrested for staying. There is a significant difference between a person believing that he is not trespassing and a person believing that he will not be arrested for trespassing. Appellant's mistaken belief that he would not be

arrested did not negate the culpability required for trespass. The trial court correctly overruled appellant's requested charge.

In his sixth through eleventh points of error, appellant contends that the trial court erred by excluding evidence which was relevant to his defense of necessity and defense of third persons. In Boushey v. State, 804 S.W.2d 148, 150-153 (Tex. App. – Corpus Christi 1990, pet. ref'd), we held that a similarly situated defendant was not entitled to these defenses. *Boushey* controls the disposition of the sixth through eleventh points of error. The trial court did not err in excluding appellant's proffered evidence. Points six through eleven are overruled.

The judgment of the trial court is affirmed.

/s/ Gerald T. Bissett
GERALD T. BISSETT,
Assigned Justice

Opinion ordered published. Tex. R. App. P. 90.

Opinion delivered and

filed this the 20th

day of February, 1992.

CHIEF JUSTICE
PAUL W. NYE

JUSTICES
NOAH KENNEDY
ROBERT J. SEERDEN
J. BONNER DORSEY
GILBERTO HINOJOSA
FEDERICO G. HINOJOSA JR.

CLERK
CATHY WILBORN

DEPUTY CLERK
MARY JANE DUARTE

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COURT OF APPEALS
THIRTEENTH SUPREME JUDICIAL DISTRICT
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

December 3, 1992

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RE: Case No. 13-91-00111-CR
Trial Court No. 90-3938-3

Style: Zarsky, Clifford Louis
v. The State of Texas

Dear Counsel:

The appellant's motion to stay issuance of mandate was this day granted by this Court.

Respectfully submitted,

CATHY WILBORN, CLERK

By: /s/ Mary Jane Duarte
Deputy

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

November 4, 1992
COA#: 13-91-00111-CR

RE: Case No. 1288-92
STATE OF TEXAS
CLIFFORD LOUIS ZARSKY

On this day, the Appellant's Pro Se Petition for Discretionary Review has been REFUSED.

JUDGE CAMPBELL WOULD GRANT.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO:
CLIFFORD I ZARSKY
4710 EVERHART
CORPUS CHRISTI TX 78411

App. 20

BEST AVAILABLE COPY

CHIEF JUSTICE
PAUL W. NYE

JUSTICES
NOAH KENNEDY
ROBERT J. SEERDEN
J. BONNER DORSEY
GILBERTO HINOJOSA
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COURT OF APPEALS
THIRTEENTH SUPREME JUDICIAL DISTRICT
TENTH FLOOR
NUECES COUNTY COURTHOUSE
CORPUS CHRISTI, TEXAS 78401

July 30, 1992

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RE: Case No. 13-91-00111-CR
Trial Court No. 90-3938-3

Style: Zarsky, Clifford Louis
v. The State of Texas

Dear Counsel:

The appellant's motion for reconsideration en banc was overruled by this Court on this day.

Respectfully submitted,

CATHY WILBORN, CLERK

By: /s/ Mary Jane Duarte
Deputy

CHIEF JUSTICE
PAUL W. NYE

JUSTICES
NOAH KENNEDY
ROBERT J. SEERDEN
J. BONNER DORSEY
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COURT OF APPEALS
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July 30, 1992

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RE: Case No. 13-91-00111-CR
Trial Court No. 90-3938-3
Style: Zarsky, Clifford Louis
v. The State of Texas

Dear Counsel:

The appellant's motion to recall mandate was this day granted by this Court. This Court's mandate is hereby withdrawn.

Respectfully submitted,
CATHY WILBORN, CLERK
By: /s/ Mary Jane Duarte
Deputy

cc: Ernest Briones, County Clerk

CHIEF JUSTICE
PAUL W. NYE

JUSTICES
NOAH KENNEDY
ROBERT J. SEERDEN
J. BONNER DORSEY
GILBERTO HINOJOSA
FEDERICO G. HINOJOSA JR.

CLERK
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COURT OF APPEALS
THIRTEENTH SUPREME JUDICIAL DISTRICT
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NUECES COUNTY COURTHOUSE
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March 26, 1992

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RE: Case No. 13-91-00111-CR
Trial Court No. 90-3938-3

Style: Zarsky, Clifford Louis
v. The State of Texas

Dear Counsel:

The appellant's motion for rehearing was overruled by this Court on this day.

Respectfully submitted,
CATHY WILBORN, CLERK
By: /s/ Mary Jane Duarte
Deputy